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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 332

RUPERT WATSON d/b/a MAINE-WIDE ADJUSTERS,

Appellant,

—v.—

STATE OF MAINE BANK COMMISSIONER,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF THE STATE OF MAINE

BRIEF IN OPPOSITION TO MOTION TO DISMISS

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

MARVIN KARPATKIN
MELVIN L. WULF
ELEANOR HOLMES NORTON
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

MALCOLM S. STEVENSON
31 Central Street
Bangor, Maine

JOSEPH T. WALSH, JR.
6 State Street
Bangor, Maine

HERBERT GOLDMAN
6950 Marsue Drive
Baltimore, Maryland 21215

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Appellee contends that this appeal was not docketed in time and must therefore be dismissed pursuant to Rule 16(1)(a) of the Rules of this Court. Appellee also moves to dismiss on the ground that Point 3 of appellant's Jurisdictional Statement—the *ex post facto* argument—presents an issue not reserved in the questions posed in appellant's Notice of Appeal or "fairly comprised therein." Both contentions are without merit.

1. Appellant has filed with the Clerk of the Court a letter from the Clerk of the Supreme Judicial Court in Maine (Appendix, *infra*, p. 5), which states that although appellant, by letter dated June 19, 1967, requested that a certified transcript of the record in this case be forwarded to the Clerk of this Court, the certified record was not forwarded until June 30, 1967, because of "some difficulty which I experienced in obtaining a copy of the record of the proceedings in the Penobscot County Superior Court." Con-

sequently, the case was not docketed until July 3, 1967, although appellant's Jurisdictional Statement was timely filed. Inasmuch as the delay resulted from no fault of appellant, appellee's contention that the appeal must be dismissed because the docketing of the case was untimely is without merit.

2. Appellee further contends that appellant's *ex post facto* argument in his Jurisdictional Statement was not "reserved in the questions posed in the Notice of Appeal or fairly comprised therein." Appellant has filed with the Clerk of this Court an affidavit (Appendix, *infra*, p. 6) of the secretary who typed and still retains the draft copy of the Notice of Appeal, which in fact contained the *ex post facto* point among the others presented. The Notice of Appeal was dictated over the telephone by New York counsel to a stenographer in Maine, where the Notice of Appeal had to be filed. Thus, a final copy of the Notice of Appeal was not received by New York counsel until after the expiration of time for its filing. In the course either of dictating the Notice of Appeal or in its transcription, Point 3 was lost through stenographic error. It is impossible to say now precisely how the error occurred. However, in light of the existence of the draft copy containing the *ex post facto* point, its omission in the actual Notice of Appeal does not rise above the level of stenographer's error.*

* Moreover it is submitted that the *ex post facto* point is any case "fairly comprised" within Point 1 of the Notice of Appeal relating to due process. This is not a case like *Head* v. *New Mexico Board*, 374 U. S. 424 (1963) in which, as appellee points out, "the argument was not made to the State Court nor was it reserved in the notice of appeal to this court." (Motion, p. 5). Rather the *ex post facto* point was raised at all stages of these proceedings below. Central to the intent of Rule 10(2)(c) is the breadth implied in the words "fairly comprised therein," for precious constitutional rights may depend upon their interpretation. In this case it cannot be doubted that the *ex post facto* point is "fairly comprised" within the meaning of due process as set forth in Point 1 in light of the

CONCLUSION

The procedural objections raised by appellee are without merit, as are his contentions, anticipated in appellant's Jurisdictional Statement, that the appeal presents no substantial federal question and that the decision below was plainly correct.

Respectfully submitted,

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

MARVIN KARPATKIN
MELVIN L. WULF
ELEANOR HOLMES NORTON
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MALCOLM S. STEVENSON
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broad wording of that argument that the statute " . . . as interpreted and applied in this case . . . effects a deprivation of liberty and property without due process of law." That an *ex post facto* law is a cardinal denial of due process cannot be denied. Compare *Bouie* v. *Columbia*, 378 U. S. 347, 354-355 (1963), where this Court held that "[i]f a state legislature is barred by the *ex post facto* clause from passing such a law, it must follow that a State Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction." It follows therefore that the *ex post facto* point is "fairly comprised" within Point 1 of appellant's Notice of Appeal.